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# In the Supreme Court of the United States

RONALD A. GRAY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES*

*(CAPITAL CASE)*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether a defendant may be sentenced to death by a court-martial panel of fewer than twelve persons.

2. Whether the convening authority's power to select subordinates to serve as court-martial members violates the Constitution.

3. Whether the military judge who conducted petitioner's voir dire complied with the procedural requirements of *Batson* v. *Kentucky*, 476 U.S. 79 (1986).

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### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-161a) is reported at 51 M.J. 1. The opinions of the United States Army Court of Military Review (now the United States Army Court of Criminal Appeals) are reported at 37 M.J. 730 (Pet. App. 163a-207a) and 37 M.J. 751 (Pet. App. 208a-229a).

### JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on May 28, 1999. Petitions for reconsideration were denied on April 6, 2000 (Pet. App. 231a) and June 26, 2000 (Pet. App. 230a). The petition for a writ of certiorari was filed on

September 25, 2000 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1259(1).

## STATEMENT

Following a general court-martial at Fort Bragg, North Carolina, petitioner, a member of the United States Army, was convicted of premeditated murder (two specifications), attempted murder, rape (three specifications), robbery (two specifications), forcible sodomy (two specifications), burglary, and larceny, in violation of Articles 118, 80, 120, 122, 125, 121, and 129 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918, 880, 920, 922, 925, 921, and 929, respectively. Pet. App. 165a. The court-martial sentenced petitioner to death, a dishonorable discharge, total forfeitures, and reduction to Private E-1. *Id.* at 3a. The Commanding General of the 82d Airborne Division approved the sentence. *Ibid.* Petitioner's convictions and sentence were affirmed by the United States Army Court of Military Review, *id.* at 163a-207a, 208a-229a, and by the United States Court of Appeals for the Armed Forces, *id.* at 1a-161a.[1]

1. Petitioner was an Army Specialist stationed at Fort Bragg, North Carolina. On December 15, 1986, he abducted, raped, sodomized, and murdered Private

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[1] Before his court-martial, petitioner pleaded guilty and was convicted in North Carolina state court of several offenses unconnected to the court-martial charges, including two counts of second degree murder, two counts of first degree burglary, five counts of first degree rape, five counts of first degree sexual offense, attempted first degree rape, three counts of second degree kidnapping, two counts of robbery with a dangerous weapon, assault with a deadly weapon with intent to kill, and inflicting serious injury. Petitioner was sentenced to three consecutive and five concurrent terms of life imprisonment for those crimes. Pet. App. 165a n.1.

Laura Lee Vickery-Clay. On January 3, 1987, he raped and attempted to murder Private Mary Ann Lang Nameth. Three days later, on January 6, he raped, sodomized, robbed, and murdered civilian Kimberly Ann Ruggles. Pet. App. 169a-171a.

The court-martial evidence established the following facts: The first victim, Private Vickery-Clay, disappeared from Fort Bragg on December 15, 1986. On that date, two witnesses saw her at a local K-Mart with a man later identified as petitioner. Vickery-Clay's car, found the next morning a block from her home, appeared to have been driven through the woods, and the driver's seat was set back farther than needed for Vickery-Clay to drive. Three fingerprints that matched petitioner's prints were found on the hood of the car. On January 17, 1987, another soldier discovered Vickery-Clay's half-naked, decomposed body in the woods in Fort Bragg. She had been raped, sodomized, and shot in the neck, forehead, chest, and back of the head. She had also suffered blunt force trauma to various parts of her body. The murder weapon—a .22 caliber pistol that petitioner had stolen in November 1986—was found approximately 60 feet from Vickery-Clay's body. Pet. App. 170a-171a; Gov't C.A. Br. 6 & n.5, 7.

On January 3, 1987, petitioner entered the barracks room of Private Mary Ann Lang Nameth under the pretense that he needed to use the bathroom. Once in the room, petitioner grabbed Nameth, held a knife to her throat, and asked for her military field gear. Petitioner then tied Nameth's hands behind her back with the cord from a curling iron, removed her underclothing, and raped her. Petitioner then stabbed her repeatedly in the neck and side and threatened to return and kill her if she screamed. Nameth suffered a

lacerated trachea and a collapsed or punctured lung. When, shortly thereafter, petitioner's photograph appeared in the newspapers and on television following his arrest for another crime, Nameth identified him as her assailant. Pet. App. 171a; Gov't C.A. Br. 10-12.

In the evening of January 6, 1987, Kimberly Ann Ruggles, a local taxi driver, was dispatched to pick up a passenger named "Ron" at petitioner's address. In the early morning hours of January 7, military police officers on routine patrol discovered Ruggles' empty taxicab parked at the edge of some woods. Her nude body was discovered a short distance away. She had been raped, sodomized, beaten, and stabbed seven times. Ruggles' mouth was gagged with a cloth belt that matched a pair of black karate pants that other police officers had found in petitioner's possession just hours earlier. Petitioner's fingerprints were found on the interior door handle of Ruggles' taxi, and Ruggles' fingerprints were found on money in petitioner's possession. Petitioner's footprints were also found at the scene of the crime. Pet. App. 169a-170a; Gov't C.A. Br. 13-17.

2. Petitioner was tried by a general court-martial over which a military judge presided. During the selection of the court-martial members, the prosecution exercised its peremptory challenge against Major Quander, one of two African-Americans on the panel. R. 762. Defense counsel objected to the challenge under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), and requested that government counsel state its reasons for the challenge. R. 762. The military judge stated that there was no evidence that the challenge was racially based, "other than the fact the man happens to be black," and noted that the defense itself had earlier sought to strike Major Quander for cause. R. 763.

Government counsel then asserted that the challenge was not based on race and offered to state the reasons for the peremptory challenge. The judge replied that no further explanation was necessary. *Ibid.* Defense counsel offered no further objection. R. 764.

At the next court session, government counsel requested and was granted leave to append to the record a written statement of the government's reasons for the peremptory challenge. R. 779. In that document, titled Memorandum for Record, government counsel averred that:

> The peremptory challenge against Major Quander was exercised because we believed his responses concerning the death penalty were equivocal. * * * When asked if he could vote for the death penalty he indicated that he "thought" he could. He also stated he had "problems" with the death penalty and the evidence would have to be "devastating" before he could vote for it. * * *
>
> Our impression of Major Quander was that he was indecisive and equivocal on the death penalty issue and that it was in the government's interest to challenge him. * * * Major Quander's race was of no consequence in the decision making process except that we considered not making the challenge to avoid any possibility of an appearance of exclusion on a racial basis.

Pet. App. 160a-161a.

Defense counsel did not object to the inclusion of the government's statement in the record, and when the military judge asked the defense if it had "[a]nything else?," defense counsel did not renew the *Batson* objection. R. 779.

A six-member court-martial was seated, and petitioner was convicted of two specifications of premeditated murder, attempted murder, three specifications of rape, two specifications of robbery, two specifications of forcible anal sodomy, larceny, and burglary. Pet. App. 165a. The court-martial sentenced petitioner to death, a dishonorable discharge, total forfeitures, and reduction to Private E-1. *Id.* at 3a. The convening authority approved the sentence. *Ibid.*

3. The United States Army Court of Military Review (now the United States Army Court of Criminal Appeals) affirmed. Pet. App. 163a-207a, 208a-229a. As relevant here, the court summarily rejected petitioner's claim that he was unconstitutionally sentenced to death by a court-martial panel of fewer than twelve members. *Id.* at 165a-166a & n.2, 222a-223a (citing *United States* v. *Curtis*, 32 M.J. 252 (C.M.A.), cert. denied, 502 U.S. 952 (1991)). The court also summarily rejected petitioner's claim that the Fifth, Sixth, and Eighth Amendments do not permit a convening authority to select military subordinates to serve as court-martial members in a capital trial. Pet. App. 213a.

Finally, the court rejected petitioner's claim that the military judge violated *Batson* by failing to require the government immediately to articulate a race-neutral reason for its peremptory challenge. The court agreed with petitioner that the military judge should have required an explanation at the time that the government made the challenge, but the court found it sufficient that government counsel introduced a written explanation at the next court session. Pet. App. 176a. The court concluded that the government's basis for the challenge—that the member's responses to questions concerning the death penalty were equivocal—was

race-neutral, and that "public confidence in the military justice system has not been undermined." *Ibid.*

4. The Court of Appeals for the Armed Forces (CAAF) also affirmed petitioner's convictions and sentence. See 10 U.S.C. 867(a)(1) (mandating review by the CAAF in any case involving a death sentence). As relevant here, the CAAF, relying on previous decisions, rejected petitioner's claim that his capital sentence was unconstitutional because the court-martial panel had fewer than 12 members. Pet. App. 103a (citing *United States* v. *Loving*, 41 M.J. 213, 287 (1994), affirmed, 517 U.S. 748 (1996), and *Curtis*, 32 M.J. at 267-268). The CAAF also summarily rejected petitioner's claim that his constitutional rights were violated because the convening authority personally selected the members of the court-martial. Pet. App. 131a-132a (citing *Weiss* v. *United States*, 510 U.S. 163 (1994); *Loving*, 41 M.J. at 297; *United States* v. *Graf*, 35 M.J. 450 (C.M.A. 1992), cert. denied, 510 U.S. 1085 (1994); and *United States* v. *Mabe*, 33 M.J. 200 (C.M.A. 1991)).

Finally, the CAAF found no reversible error in the military judge's handling of the *Batson* challenge. Pet. App. 63a-68a. The court noted that, at the time of petitioner's trial, the CAAF had not yet held that *Batson* applied to courts-martial or that the defense made out a prima facie case of discrimination by showing that a single peremptory challenge was lodged against a court-martial member of the same minority race as the accused. *Id.* at 65a. The CAAF reasoned, moreover, that, even if the military judge had erred in concluding that defense counsel had not made a prima facie case of racial discrimination requiring the government to proffer a race-neutral explanation for the strike, the judge shortly thereafter allowed the government to submit a written explanation. *Id.* at 65a-

66a. That explanation, the CAAF noted, "*i.e.*, Major Quander's indecisiveness on the death penalty as a punishment, is a well recognized race-neutral explanation for a peremptory challenge." *Id.* at 66a (citing cases). Finally, the CAAF concluded that the military judge had adequately performed the third step in the *Batson* inquiry. Although the CAAF noted that it would have been preferable for the military judge to state expressly that he did not find the government's explanation pretextual, the CAAF concluded that the judge's conduct in its entirety "constitute[d] an implied ruling on his part that trial counsel's explanation was genuine and that [petitioner's] *Batson* claim was without merit." *Id.* at 67a.

Two judges dissented from the disposition of petitioner's *Batson* claim. Pet. App. 145a-159a. The dissent concluded that the military judge erred by granting the peremptory challenge without requiring the government to provide a contemporaneous race-neutral explanation. *Id.* at 150a. In the dissent's view, the fact that the prosecutor filed a statement explaining the reasons for the strike, "after the military judge [had] refused to require compliance with *Batson*, [did] not remedy the error by the military judge." *Ibid.* The dissent further concluded that the judge failed to comply with his duty under the third step of the *Batson* inquiry to determine whether petitioner had established purposeful discrimination. *Id.* at 151a-152a.

## ARGUMENT

1. a. Petitioner contends (Pet. 6-9) that the military sentencing procedures are unconstitutional because they allow a capital sentence to be imposed when, as was the case here, the court-martial panel consists of fewer than 12 members. See Art. 16(1)(A), UCMJ, 10

U.S.C. 816(1)(A) (general court-martial may consist of "a military judge and not less than five members"); see also Art. 52(b)(1), UCMJ, 10 U.S.C. 852(b)(1) (unanimity required when court-martial imposes sentence of death). This Court has previously declined to review that issue, see *Loving* v. *United States*, 515 U.S. 1191 (1995) (No. 94-1966), and this case does not warrant a different result.

As petitioner recognizes (Pet. 7), this Court has repeatedly held that the Jury Trial Clause of the Sixth Amendment does not apply to courts-martial. See, *e.g.*, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866); *Ex parte Quirin*, 317 U.S. 1, 40-41 (1942); *Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950); *Reid* v. *Covert*, 354 U.S. 1, 19 (1957) (plurality opinion); *O'Callahan* v. *Parker*, 395 U.S. 258, 261 (1969), overruled on other grounds by *Solorio* v. *United States*, 483 U.S. 435 (1987). The Fifth Amendment specifically exempts "cases arising in the land or naval forces" from the requirement of an indictment by a grand jury for serious crimes. By drafting the Fifth Amendment in that manner, "the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth." *Ex parte Milligan*, 71 U.S. (4 Wall.) at 123. As the Court explained in *Ex parte Quirin*, 317 U.S. at 39, neither Article III of the Constitution nor the Sixth Amendment requires a trial by jury in the military, because those provisions were intended "to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law * * *, but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right." Accordingly, because

petitioner had no Sixth Amendment right to a trial by a petit jury, he also had no right to a court-martial panel composed of 12 persons.[2]

Petitioner's reliance (Pet. 8) on this Court's Eighth Amendment jurisprudence is also misplaced. The Eighth Amendment does not guarantee a defendant in a capital case (or in any other) the right to have the jury fix his punishment, even when a sentence requires specific findings of fact. See, *e.g.*, *Harris* v. *Alabama*, 513 U.S. 504, 509-510 (1995); *Walton* v. *Arizona*, 497 U.S. 639, 648 (1990); *Spaziano* v. *Florida*, 468 U.S. 447, 459 (1984). Thus, although petitioner is correct that this Court's cases reflect the need for a higher degree of reliability in capital cases, this Court has repeatedly rejected the claim that jury sentencing is an indispensable means of achieving that reliability.

In support of his argument, petitioner relies heavily (Pet. 6, 8-9) on the fact that many States and the federal government leave the capital sentencing decision to 12 jurors, rather than some fewer number. By petitioner's own tally (Pet. 7 n.3), however, nine of the 38 States that permit capital punishment leave the final decision to the trial judge, rather than to the jury. There is accordingly no societal consensus that imposition of a death sentence requires the unanimous decision of 12 individuals. In any event, the state experience in the civilian context does not bear on the proper sentencing

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[2] In any event, a six-member panel, which petitioner had, is sufficiently large to satisfy the Sixth Amendment's jury trial guaranty, when it is applicable. *Williams* v. *Florida*, 399 U.S. 78, 86-103 (1970). Indeed, petitioner does not claim that the panel was too small to find him guilty, but only to sentence him to death. The Sixth Amendment, however, does not require that sentencing be performed by a jury, even in a capital case. See, *e.g.*, *Hildwin* v. *Florida*, 490 U.S. 638, 640-641 (1989) (per curiam).

procedures for courts-martial. Cf. *Weiss*, 510 U.S. at 177 (the requirements of due process differ in the military and civilian contexts). In the military context, Congress's judgment as to the appropriate size of courts-martial is a reasonable one. The essential function of the military is "to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955). When members of the armed forces are diverted from that function by the need to serve on a court-martial panel, "the basic fighting purpose of armies is not served." *Ibid.* Congress reasonably determined that the rights of servicemen are adequately protected by the court-martial process without the further diversion of resources that would be required to provide 12-member panels in each case.[3]

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[3] Moreover, as the CAAF has noted, defendants found guilty and sentenced to death by courts-martial enjoy safeguards not available to persons convicted and sentenced to death in civilian courts, including the convening authority's power to commute the sentence and the fact that "a Court of Military Review, composed of trained appellate military judges, must thoroughly review the law, the facts, and the appropriateness of the accused's sentence." *Curtis*, 32 M.J. at 268. Indeed, unlike civilian appellate courts, which review sufficiency claims under a deferential standard, *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979), military courts have required the prosecution independently to prove the defendant's guilt before a court of military review. A court of military review must independently review the record and be convinced of the correctness of the court-martial panel's findings, including its ultimate finding that the accused is guilty, before the findings may be upheld. See Art. 66(c), UCMJ, 10 U.S.C. 866(c); *United States* v. *Palenius*, 2 M.J. 86, 91 n.7 (C.M.A. 1977); see also *Ryder* v. *United States*, 515 U.S. 177, 187 (1995). Furthermore, in cases involving a sentence of death, the UCMJ mandates a second tier of review before the CAAF. See Art. 67(a)(1), UCMJ, 10 U.S.C. 867(a)(1). Finally, no death sentence can be carried out until it is approved by the President of the United States, who "may

b. For the first time in this Court, petitioner contends (Pet. 9-16) that the lack of a fixed number of panel members in capital courts-martial violates both the Due Process Clause and the Eighth Amendment. He argues that, because members stricken from the court-martial panel often are not replaced, each strike reduces the number of persons that the prosecution must convince of the accused's guilt; accordingly, petitioner argues, the accused "has little to no incentive" (Pet. 10) to engage in voir dire or to exercise challenges. Petitioner forfeited this claim by failing to raise it before any of the military courts. See, *e.g.*, *Glover* v. *United States*, 121 S. Ct. 696, 701 (2001) (this Court ordinarily does not decide questions neither raised nor decided below).

In any event, the claim lacks merit and does not warrant this Court's review. The Constitution authorizes Congress to "make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, Cl. 14, and grants Congress "primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." *Solorio*, 483 U.S. at 447. See also *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion). Congress's judgment about the desirability of mandating a fixed panel size, like its judgment about the minimum number of members that may appropriately comprise a court-martial, is entitled to special deference. See *Weiss*, 510 U.S. at 177. "The constitution of courts-martial, like other matters relating to their organization and administration," is an issue particularly "appropriate for congressional action." *Whelchel*, 340 U.S. at 127. Moreover, the practices at

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commute, remit, or suspend the sentence, or any part thereof, as he sees fit." Art. 71(a), UCMJ, 10 U.S.C. 871(a).

issue have been carried forward from the earliest days of our nation. Cf. *Solorio*, 483 U.S. at 447.

Contrary to petitioner's assertion (Pet. 13), the doctrine of unconstitutional conditions is not implicated here. That "well-settled" doctrine provides only that "the government may not require a person to give up a constitutional right * * * in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the [right that is waived]." *Dolan* v. *City of Tigard*, 512 U.S. 374, 385 (1994). As petitioner acknowledges (Pet. 13), the military does not deny defendants the right to engage in voir dire or to exercise challenges; nor does the government actually exact anything from the accused who avails himself of those rights. To the extent that defense counsel must weigh the potential benefits of engaging in voir dire or exercising challenges against speculative detriment to the accused, that consideration is not meaningfully different from the many strategic decisions that both sides must make at numerous points in any criminal trial. See *Ohler* v. *United States*, 120 S. Ct. 1851, 1854 (2000) ("both the Government and the defendant in a criminal trial must make choices as the trial progresses"); accord, *e.g.*, *Jenkins* v. *Anderson*, 447 U.S. 231, 236 (1980); *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 30-31 (1973).

There also is no merit to petitioner's claim (Pet. 14-16) that the absence of a fixed panel size in capital courts-martial violates the Eighth Amendment. Each court-martial, regardless of the number of members, discharges its duties pursuant to the laws and regulations set forth in the UCMJ and the Rules for Courts-Martial. Petitioner does not dispute that those governing rules provide courts-martial "with objective standards to guide, regularize, and make rationally

reviewable the process for imposing a sentence of death." *Woodson* v. *North Carolina*, 428 U.S. 280, 303 (1976).

The fact that military personnel have been sentenced to death by courts-martial of varying sizes (see Pet. 9 n.4) does not establish that the military's application of the death penalty is unreliable or arbitrary. The statistics cited by petitioner do not show that panel size actually "enters into any capital sentencing decisions or that [size] was a factor in [petitioner's] particular case." *McCleskey* v. *Kemp*, 481 U.S. 279, 308 (1987). Indeed, petitioner does not even allege that the frequency with which courts-martial sentence an accused to death correlates with the size of the panel. In any event, as this Court has noted, many "factors may influence the outcome of a trial and a defendant's ultimate sentence, even though they may be irrelevant to his actual guilt." *Id.* at 307 n.28. As in any system that includes a measure of sentencing discretion, "a defendant's ultimate sentence necessarily will vary according to the judgment of the sentencing authority." *Ibid.*

2. Petitioner further contends (Pet. 17-23) that the convening authority's power to select subordinates as court-martial members violates the Fifth and Eighth Amendments. That claim also lacks merit and does not warrant this Court's attention.

Congress has empowered the convening authority (usually the commanding officer) to select the members of a court-martial according to statutorily enumerated criteria that limit the convening authority's discretion.[4]

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[4] In relevant part, Art. 25(d)(2), UCMJ, 10 U.S.C. 825(d)(2), provides:

> When convening a court-martial, the convening authority shall detail as members thereof such members of the armed

Moreover, Congress was sensitive to the concerns raised by petitioner about improper influence, and it addressed those concerns thoroughly in Article 37 of the UCMJ. That Article provides that no convening authority nor any other commanding officer "may censure, reprimand, or admonish the court or any member * * * thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding." Art. 37(a), UCMJ, 10 U.S.C. 837(a). Any "attempt to coerce or, by any unauthorized means, influence the action of a court-martial" is also expressly forbidden. Art. 37(a), UCMJ, 10 U.S.C. 837(a). Although petitioner relies heavily on the convening authority's alleged control over each subordinate's career, Congress has expressly provided that, in preparing any report or document to be used in determining the assignments or advancement of a member of the armed forces, no military personnel may "consider or evaluate the performance of duty of any such member as a member of a court-martial." Art. 37(b), UCMJ, 10 U.S.C. 837(b). As this Court noted in *Weiss*, "[a]ny officer who 'knowingly and intentionally fails to enforce or comply' with Article 37 'shall be punished as a court-martial may direct.'" *Weiss*, 510 U.S. at 180 (quoting Art. 98, UCMJ, 10 U.S.C. 898).

This Court has often noted that "Congress has 'plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.'" *Weiss*, 510 U.S. at 177 (quoting

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forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.

*Chappell* v. *Wallace*, 462 U.S. 296, 301 (1983)). The statutory provisions at issue here reflect the care with which Congress has approached its "delicate task of balancing the rights of servicemen against the needs of the military." *Solorio*, 483 U.S. at 447-448. Congress's judgment on the question of how court-martial members shall be selected is entitled to "particular deference." *Weiss*, 510 U.S. at 177 (quoting *Middendorf* v. *Henry*, 425 U.S. 25, 43 (1976)). Petitioner has not shown that the members of his panel were biased or that the appearance of bias is "so extraordinarily weighty as to overcome the balance struck by Congress." *Middendorf*, 425 U.S. at 44.[5]

Review by this Court of the selection issue is particularly unwarranted because there is a possibility that Congress may alter the present method of selecting court-martial members. As petitioner himself notes (Pet. 21), in the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Congress ordered the Secretary of Defense to submit "a report on the method of selection of members of the Armed Forces to serve on courts-martial." Pub. L. No. 105-261, § 552(a), 112 Stat. 2023. As Congress directed, the report that the Secretary has submitted "examine[s] alternatives, including random selection, to the

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[5] In *Weiss*, this Court rejected the contention that the absence of fixed terms of service for military judges violated the Due Process Clause. The Court declined "to assume that a military judge who does not have a fixed term of office lacks the independence necessary to ensure impartiality." 510 U.S. at 178. Relying in part on Article 37 of the UCMJ, the Court concluded that "the applicable provisions of the UCMJ, and corresponding regulations, by insulating military judges from the effects of command influence, sufficiently preserve judicial impartiality so as to satisfy the Due Process Clause." *Id.* at 179.

current system of selection of members of courts-martial by the convening authority," and evaluates each such alternative. § 552(b), 112 Stat. 2023. Although the report does not recommend a change in the current selection system, Congress's directive indicates that Congress is considering whether a change is appropriate. Because congressional action could moot the question presented here, this Court's review of that question is not appropriate at this time.

3. Petitioner last contends (Pet. 23-28) that the military judge "failed to perform his duty" (Pet. 23) under *Batson* to require the government to provide a race-neutral explanation for its peremptory challenge and to determine whether the government's explanation was pretextual. Both military appellate courts correctly concluded that there was no *Batson* violation in this case, and petitioner's fact-bound claim to the contrary does not warrant further review.

In *Batson*, this Court held that a prosecutor may not use a peremptory challenge to exclude from the venire a member of a cognizable racial group on the basis of that person's race. *Batson*, 476 U.S. at 89. If the defendant makes a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the juror or jurors in question. The trial judge must then determine whether the defendant has carried his burden of proving purposeful discrimination. *Id.* at 96-98. The Court in *Batson* "decline[d], however, to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." *Id.* at 99; see also *id.* at 99-100 n.24 ("[W]e make no attempt to instruct [state and federal trial] courts how best to implement our holding today.").

In this case, the government used its peremptory challenge to strike one of two African-American court members. Following defense counsel's objection, the military judge apparently concluded that defense counsel had failed to establish a prima facie case under *Batson*, and declined to require government counsel to state its reasons for the challenge.[6] Nonetheless, at the very next court session, the military judge granted the prosecutor's request to append to the record a written statement of the prosecutor's reasons for the challenge.[7] Although not immediately contemporaneous, the government's explanation was submitted to the military judge at the next possible opportunity—just three days later. There is no reason to believe that this brief lapse of time compromised the military judge's ability to evaluate the candor of the prosecution's explanation. See, *e.g.*, *Hernandez* v. *New York*, 500 U.S. 352, 365 (1991) (plurality opinion) ("evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province'") (quoting *Wainwright* v. *Witt*, 469 U.S. 412, 428 (1985)). Petitioner has cited no legal authority either before the CAAF (see Pet. App. 64a) or in this Court for his assertion that the government's explanation for the strike is fatally untimely. Compare *Turner* v. *Marshall*, 121 F.3d 1248, 1251 (9th Cir. 1997) (prosecutor gave no contemporaneous explanation for strikes;

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[6] The judge said that he found no evidence that the challenge was racially based, noting that the defense itself had earlier challenged the same member for cause on the basis of rumors the member had heard and articles he had read. R. 763.

[7] As the CAAF noted (Pet. App. 65a), even if the military judge erred in concluding that a prima facie case had not been established, that error was rendered moot by the government's subsequent proffer of a written explanation for the strike.

*Batson* hearing conducted six years after voir dire), cert. denied, 522 U.S. 1153 (1998); *Holder* v. *Welborn*, 60 F.3d 383, 388 (7th Cir. 1995) (prosecutor gave no contemporaneous explanation for strikes; *Batson* hearing conducted eight years after voir dire). Accordingly, there is no reason for this Court to review the conclusion—reached by both military appellate courts—that, in the circumstances of this case, the government's race-neutral explanation complied with *Batson*.

Moreover, legal developments since petitioner's court-martial make it unlikely that the facts presented here will recur. In *United States* v. *Moore*, 28 M.J. 366, 368 (C.M.A. 1989), the CAAF "adopt[ed] a *per se* rule" of procedure, applicable to all of the armed services, for handling *Batson* claims. Because counsel at courts-martial are entitled only to one peremptory challenge, it is difficult to establish a pattern of discriminatory strikes. The CAAF in *Moore* therefore held that the exercise of that single challenge against a member of a cognizable racial group constitutes a prima facie case of discrimination under *Batson*. *Id.* at 368. Thus, it has been the rule at all military courts-martial since 1989 that "every peremptory challenge by the Government of a member of the accused's race, upon objection, must be explained by trial counsel." *Ibid.* Petitioner does not contend that military judges have been unable or unwilling to adhere to *Moore;* nor does he cite any case since *Moore* in which a military judge has allowed the government to provide its race-neutral explanation other than immediately following a *Batson* challenge. Therefore, the question petitioner asks this Court to resolve is of no continuing importance.

The CAAF also did not err in concluding that the military judge implicitly ruled that the government's

race-neutral explanation for the strike was credible.[8] Pet. App. 66a-67a. After the government provided its explanation, defense counsel did not review the *Batson* objection. The military judge inquired whether defense counsel had "[a]nything else" to say in response to the explanation, and defense counsel did not. R. 779. The CAAF correctly examined the statements and conduct of the military judge in their entirety and concluded that they reflected an implied ruling that the government's explanation was genuine and that petitioner's *Batson* claim lacked merit. See *ibid.* That case-specific conclusion does not warrant further review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] Petitioner did not raise that contention before the CAAF. See Def. C.A. Br. 177-188. The panel majority addressed the issue only because the dissent chose, *sua sponte*, to raise it. See Pet. App. 64a.